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No. _____

In The
Supreme Court of the United States

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN,

Petitioner,

v.

EDWARD J. FOLEY, SR.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITIONER INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION NO. 98 PENSION PLAN'S PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a former pension plan fiduciary, who filed a lawsuit seeking personal pension benefits to which he was found to be not entitled, should be required to reimburse a prevailing pension plan defendant its attorney's fees and costs, unless the former fiduciary could show that his lawsuit was substantially justified or that special circumstances make an award against him unjust?

2. What is the proper test for determining an award of attorney's fees and costs under ERISA against a former pension plan fiduciary and in favor of a prevailing pension plan where the former fiduciary filed a lawsuit seeking personal pension benefits to which he was found to be not entitled?

PARTIES TO THE PROCEEDINGS

Petitioner

International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan

Respondent

Edward J. Foley, Sr.

Other Parties

The International Brotherhood of Electrical Workers Local 98; Trustees John J. Dougherty, Edward Neilson, Joseph Agresti, Thomas J. Reilly, Jr., Dennis Link, William Rhodes, Roy Dantz and Larry Bradley and Union Officers John J. Dougherty, Edward Neilson and Fred Compton were parties in the proceedings below but are not parties to this Petition for a Writ of Certiorari.

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a public company and there is no parent company of Petitioner.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
PARTIES TO THE PROCEEDINGS	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	1
STATUTORY PROVISIONS INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	2
A. Statement of Jurisdiction	2
B. Relevant Factual Background	3
1. Summary of the Proceedings	3
2. The Plan's Appeal to the Court of Appeals for the Third Circuit of the District Court's Denial of its Request for Attorney's Fees and Costs	4
ARGUMENT	6
A. The Five-Factor Test Created By the Courts of Appeals Is Inappropriate for Determining Attorney Fee Awards to Prevailing Defendants	7
B. ERISA's Legislative History Supports Petitioner's Request for Attorney's Fees	13
CONCLUSION	18
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Bittner v. Sadoff & Rudoy Industries, 728 F.2d 820 (7th Cir. 1984) 9, 11, 12

Cottrill v. Sparrow, Johnson & Ursillo, Inc., 100 F.3d 220 (1st Cir. 1996) 6, 7, 9

Eaves v. Penn, 587 F.2d 453 (10th Cir. 1978) 8

Eddy v. Colonial Life Insurance Co. of America, 59 F.3d 201 (D.C. Cir. 1995) 6, 8

Ellison v. Shenango Inc. Pension Board, 956 F.2d 1268 (3d Cir. 1992) 6, 8

Foley v. IBEW Local Union 98 Pension Fund, 271 F.3d 551 (3d Cir. 2001) ..... *passim*

Giardono v. Jones, 867 F.2d 409 (7th Cir. 1989) 11, 12

Gray v. New England Telephone & Telegraph Co., 792 F.2d 251 (1st Cir. 1986) 9, 17

McDonald v. Schweiker, 726 F.2d 311 (7th Cir. 1983) 12

McPherson v. Employees' Pension Plan of America Re-Insurance Co., Inc., 33 F.3d 253 (3d Cir. 1994) 8

Monkelis v. Mobay Chemical, 827 F.2d 935 (3d Cir. 1987) 7, 8, 13, 15

Nichol v. Pullman Standard, Inc., 889 F.2d 115 (7th Cir. 1989) 11

Tobin v. General Electric Co., 1996 WL 730551 (E.D. Pa. Dec. 11, 1996), *aff'd*, 118 F.3d 1578 (3d Cir. 1997) 7

TABLE OF AUTHORITIES – Continued

Page

Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983) 5, 8, 9

Van Boxel v. The Journal Company Employees' Pension Trust, 836 F.2d 1048 (7th Cir. 1988) 11, 12

STATUTES

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1331 2

28 U.S.C. § 2412(d)(1)(A) 11

29 U.S.C. § 1132(g)(1) ..... *passim*

MISCELLANEOUS

Mark Howard Berlind, *Attorney's Fees Under ERISA: When Is An Award Appropriate?*, 71 Cornell L. Rev. 1037, 1042 (1986) 8

Private Pension Plan Reform – Part 1: S. Hearings Before the Subcomm. on Private Pension Plans of the Comm. on Fin., 93 Cong. (1973) 13, 14, 15

Retirement Income Sec. for Employees Act: S. Hearings Before the Subcomm. on Labor of the S. Labor and Pub. Welfare Comm., 93 Cong. (1972) 13, 14

Welfare and Pension Plan Legislation: Hearings on H.R. 2 and H.R. 462 Before the Gen. Subcomm. on Labor Comm. on Educ. and Labor, 93 Cong. (1973) 13, 14, 15

STAFF OF THE JOINT COMM. ON INTERNATIONAL REVENUE TAXATION, DIGEST OF TESTIMONY ON PROPOSALS FOR PRIVATE PENSION PLAN REFORM, 93d Cong. (Comm. Print 1973) 13

OPINIONS BELOW

The judgment and opinion of the Court of Appeals, reproduced in the Appendix ("*App.*") at *App.* 1-5, from which this appeal is taken are unpublished. The opinion and judgment of the United States District Court for the Eastern District of Pennsylvania denying the Plan's motion for attorney's fees, reproduced at *App.* 6-13, is reported at 2002 WL 734340 (E.D. Pa. 2002). The opinion and judgment of the Court of Appeals, reversing the District Court's entry of judgment in favor of Foley, reproduced at *App.* 12-34, is reported at 271 F.3d 551 (3d Cir. 2001).

STATEMENT OF JURISDICTION

The Court of Appeals entered judgment against petitioner on its fee request on April 11, 2003, *App.* 1-2. This Court has jurisdiction under 28 U.S.C. Section 1254(1): "Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petitioner to any civil or criminal case, before or after rendition of judgment or decree[.]"

STATUTORY PROVISIONS INVOLVED IN THE CASE

Title 29, United States Code, Section 1132(g)(1) states as follows: "In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion

may allow a reasonable attorney's fee and costs of action to either party."

STATEMENT OF THE CASE

A. Statement of Jurisdiction

The District Court had Federal Question Jurisdiction under 28 U.S.C. § 1331 because the action was brought pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §§ 1001 *et seq.*, more specifically, 29 U.S.C. § 1132(g)(1) and 28 U.S.C. § 1331 (Federal Question). This Petition for Writ of Certiorari is sought under Rules 10(a) and 10(c) of the Supreme Court Rules, which provide in pertinent part as follows:

> A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; . . .
>
> (c) a . . . United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court. . . .

B. Relevant Factual Background

1. Summary of the Proceedings

Respondent, Edward J. Foley ("Foley"), was the former president of the International Brotherhood of Electrical Workers Local Union No. 98 ("Union"). Foley was also a former trustee of the Petitioner, International Brotherhood of Electrical Workers Local Union No. 98 Pension Plan ("Plan") and the former secretary of the Plan's Board of Trustees. On February 23, 1998, no longer being a trustee, Foley filed a lawsuit against the Plan and its Trustees ("Pension Plan Defendants"). Foley filed his lawsuit because the Trustees unanimously voted to remove certain credited service that Foley was improperly awarded at the time he was a trustee from Foley's pension record, thereby reducing Foley's pension benefits. In his lawsuit, Foley asserted claims under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, *et seq.* ("ERISA"), the Labor and Management Reporting Act of 1974, and the Internal Revenue Code. The District Court dismissed all of Foley's non-ERISA claims. The Plan ultimately prevailed on the merits in this lawsuit after the Plan appealed to the United States Court of Appeals for the Third Circuit. The decision of the Court of Appeals is published at *Foley v. IBEW Local Union 98 Pension Fund*, 271 F.3d 551 (3d Cir. 2001) and sets forth the facts of this case and analysis of Foley's ERISA claim.

To summarize the Third Circuit's opinion, the Court implied that Foley's claim was without merit because Foley, due to his status as a former Plan trustee, was not similarly situated to other rank and file Union members who had been granted the benefit of the exception that would have entitled him to the pension credits he sought for the years in question. Moreover, the Court indicated

that issues of impropriety abounded in part because Foley had personally appointed the trustees to the Plan who spoke on his behalf and voted for his extra benefits, the committee that investigated Foley's improprieties had no evidence to show that Foley was entitled to the extra benefits and Foley did nothing to provide such evidence. The Court of Appeals for the Third Circuit accordingly reversed the District Court's judgment.

After judgment was entered in its favor, the Plan filed a Motion for Attorney's Fees and Costs pursuant to Section 502(g)(1) of ERISA (29 U.S.C. § 1132(g)(1)). Without considering the substance of the decision of the Court of Appeals overturning its opinion, the District Court denied the Plan's motion. The Plan filed an appeal to the United States Court of Appeals for the Third Circuit, which affirmed the District Court's decision to deny the Plan's request for fees.[1]

2. The Plan's Appeal to the Court of Appeals for the Third Circuit of the District Court's Denial of its Request for Attorney's Fees and Costs

In its appeal to the Court of Appeals for the Third Circuit, the Plan asserted that the District Court erred when it denied the Plan's request for attorney's fees and

[1] After the Court of Appeals for the Third Circuit affirmed the District Court's decision denying the Plan's request for attorney's fees and costs, Foley filed a motion in the Court of Appeals, seeking reimbursement of his attorney's fees allegedly incurred in defending the Plan's appeal. The Court of Appeals, which is without jurisdiction to decide Foley's motion, has not yet ruled upon Foley's motion.

costs under ERISA. The Plan asserted that the District Court ignored the substance of the Third Circuit's opinion, in which that Court implicitly found that Foley's claim was meritless and partisan, smacking of insider status, due to his position as a Plan trustee at the time his pension credits were improperly awarded. The Plan also asserted that the District Court did not properly analyze the five factors set forth by the Third Circuit in *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983) and its progeny in determining attorney's fees awards because it did not consider Foley's status as a former Plan trustee.

The Third Circuit issued a brief *per curiam* opinion and affirmed the District Court's decision. The Third Circuit did not set forth any analysis, other than to merely state:

> [G]iven the district court's thoughtful discussion, no purpose will be served by this court undertaking a redundant analysis simply to arrive at the same result. Therefore, we will affirm the decision of the district court substantially for the reasons set forth in the district court's Memorandum Opinion without further elaboration.

By summarily affirming the District Court's decision, the Third Circuit effectively held that a former pension Plan trustee, who filed a meritless lawsuit in which he sought pension benefits to which he was not entitled, may not be held accountable to the Plan for reimbursement of its attorney's fees under ERISA.

ARGUMENT

This Petition raises an important question about a pension plan's entitlement to attorney's fees and costs that it incurs in successfully defending a lawsuit filed by a former plan trustee, who sought to recover pension benefits for himself and to which it was found he was not entitled. This Petition also seeks to address a conflict in the circuit courts of appeals in which the courts have applied different standards for determining awards of attorney's fees to prevailing parties pursuant to Section 502(g)(1) of ERISA.

Section 502(g)(1) of ERISA permits either party to recover its attorney's fees incurred in a lawsuit. However, this Court has never established the standards to be utilized in determining when such an award in favor of a prevailing pension plan defendant and against a former plan trustee is warranted.

Despite limitations imposed by statutory language and relevant legislative history, courts have created and applied an expansive five-factor test to be utilized in determining whether and when to award such fees. In contravention of relevant legislative history, this five-factor test is improperly skewed in favor of prevailing plaintiffs and is inapplicable when considering awards to prevailing pension plan defendants. The five-factor test is contrary to ERISA's neutral stance on a party's right to recover attorney's fees and costs.[2] Accordingly, this

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[2] *See e.g., Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir. 1996); *Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201, 205-206 (D.C. Cir. 1995); *Ellison v. Shenango Inc. Pension*

(Continued on following page)

five-factor test is not appropriate when determining an award of fees to a prevailing pension plan defendant and against a former trustee and fiduciary. The Court of Appeals for the Seventh Circuit has articulated and applied a standard that is much more appropriate for determining an award of attorney's fees and costs to a prevailing pension plan defendant and against a former plan trustee. The Plan respectfully submits that the standard set forth by the Seventh Circuit should be adopted throughout the federal court system for determining an award of attorney's fees where a pension plan defendant prevails against a former trustee.

A. The Five-Factor Test Created By the Courts of Appeals Is Inappropriate for Determining Attorney's Fee Awards to Prevailing Defendants

Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1), provides that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." Although not expressly required by ERISA, in practice courts have awarded attorney's fees only to "prevailing" parties, including prevailing pension plan defendants. *See e.g.*, *Monkelis v. Mobay Chemical*, 827 F.2d 935, 936-37 (3d Cir. 1987); *Tobin v. General Electric Co.*, 1996 WL 730551, at *2 (E.D. Pa. Dec. 11, 1996), *aff'd*, 118 F.3d 1578 (3d Cir. 1997). Section 502(g)(1) of ERISA is neutral and does not favor awards of attorney's fees only to prevailing ERISA plaintiffs. *See e.g.*, *Cottrill v. Sparrow,*

Bd., 956 F.2d 1268, 1274 (3d Cir. 1992) and legislative history set forth in Section B.

Johnson & Ursillo, Inc., 100 F.3d 220, 226 (1st Cir. 1996); *Eddy v. Colonial Life Ins. Co. of America*, 59 F.3d 201, 205-06 (D.C. Cir. 1995); *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1274 (3d Cir. 1992).

In determining whether to award attorney's fees and costs to a prevailing party, the majority of the circuit courts of appeals have articulated and applied a five-factor test to guide the courts' consideration. The factors are:

> (1) the offending party's bad faith or culpability;
>
> (2) the offending party's ability to satisfy an award;
>
> (3) the award's deterrent effect;
>
> (4) the benefits conferred on members of the plan as a whole; and
>
> (5) the relative merits of the parties' positions.

E.g., *Monkelis*, 827 F.2d at 936; *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983).[3] The Court of Appeals for the Third Circuit, as well as other circuits, imposes this five-factor test in determining attorney's fees awards to *both* plaintiffs *and* defendants, and requires an analysis of each factor. *E.g.*, *McPherson v. Employees' Pension Plan of America Re-Insurance Co., Inc.*, 33 F.3d 253, 256 (3d Cir.

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[3] This five-factor test originated in the Tenth Circuit in *Eaves v. Penn*, 587 F.2d 453 (10th Cir. 1978). Mark Howard Berlind, *Attorney's Fees Under ERISA: When Is An Award Appropriate?*, 71 Cornell L. Rev. 1037, 1042 (1986). The *Eaves* Court did not explain how or why it created this test. *Id.*

1994); *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983). However, the five-factor test improperly favors ERISA plaintiffs and is inapplicable when considering attorney's fees awards to prevailing defendants. *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 829 (7th Cir. 1984); *Cottrill v. Sparrow, Johnson & Ursillo, Inc.*, 100 F.3d 220, 226 (1st Cir. 1996) (recognizing that the five-factor test has "a built-in-bias in favor of prevailing plaintiffs") (citation omitted); *Gray v. New England Telephone & Telegraph Co.*, 792 F.2d 251, 258-59 (1st Cir. 1986) (noting in essence that the five factors are biased in favor of plaintiffs).

At least the first, second and fourth factors have no bearing on an award of attorney's fees to prevailing defendants. *Bittner*, 728 F.2d at 829. These factors have no bearing on defendants, in part, because the term "offending parties" in the first two factors is "obviously a reference to defendants." *Id.* Moreover, the second factor "applies to a case where any award of attorney's fees to the plaintiff would be paid not out of the pockets of the people responsible for the denial of benefits to the plaintiff – the plan's trustees, . . . but out of the plan's assets themselves, thus hurting the plan beneficiaries." *Id.* The fourth factor, "benefit conferred on members of the plan as a whole," is determined from the basis of a plaintiff's claim and thus, is relevant "only where the plaintiff is seeking an award of attorney's fees." *See id.*

Indeed, "offending party" cannot be an ERISA plaintiff because, as in the present case, an ERISA plaintiff is one who typically files an application for pension benefits and is denied all or part of those benefits. The "offending party" is the one who denied those benefits (*i.e.*, the defendant pension plan and/or its trustees).

Moreover, the second factor, ability to pay, always weighs in favor of an award of fees to plaintiffs. Pension plan defendants will nearly always have the pension plan, the fund or fiduciary responsibility insurance to satisfy an award. Thus, losing pension plan defendants will always have an ability to pay an award. However, when a prevailing plan defendant seeks fees from an individual ERISA plaintiff, it is a rare occasion, if ever, where individual plaintiffs will have an ability to pay a large award. This factor will accordingly almost always weigh against an award of fees to prevailing defendants and in favor of an award to prevailing plaintiffs, whatever the degree of lack of merit that exists in their lawsuit.

In addition, it is an ERISA plaintiff who typically confers a benefit on the pension plan, if he or she prevails, because plaintiff's case sets a precedent that governs the distribution or entitlement to pension benefits for all plan beneficiaries.[4] Accordingly, these three factors typically only are relevant in considering attorney's fee requests made by prevailing ERISA plaintiffs. Since the majority of these factors could not weigh in favor of prevailing defendants, the five-factor test is inherently biased in favor of

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[4] Although prevailing ERISA plaintiffs are the ones who typically confer a benefit on the plan beneficiaries, in this case the Plan actually conferred a benefit on its beneficiaries in its successful defense of Foley's case. In the underlying case, the Third Circuit Court of Appeals set forth a new standard governing plan trustees. This standard benefits the plan participants and beneficiaries as a whole because it confers more discretion to trustees in determining beneficiaries' entitlement to benefits. *See Foley v. IBEW Local Union 98 Pension Fund*, 271 F.3d 551 (3d Cir. 2001).

ERISA plaintiffs and is inapplicable to prevailing defendants. This test is therefore inappropriate for determining attorney's fees awards to prevailing pension plan defendants under the neutral statutory fee provision.

Recognizing that the five-factor test is ineffective as applied to prevailing defendants, the Court of Appeals for the Seventh Circuit applies an alternate standard in determining attorney's fees awards. The Court of Appeals for the Seventh Circuit stated,

> . . . the five-factor test "is oriented toward the case where the plaintiff rather than the defendant prevails and seeks an award of attorney's fees." [*Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 829 (7th Cir. 1984).] As a result *Bittner* proposed an alternative test under which fees *should be awarded* to the prevailing party "unless the loser's position, while rejected by the court, had a solid basis – more than merely not frivolous, but less than meritorious." *Id.* at 830.

Nichol v. Pullman Standard, Inc., 889 F.2d 115, 121 (7th Cir. 1989) (citing *Bittner*, 728 F.2d at 829-830 (emphasis added); *Van Boxel v. The Journal Company Employees' Pension Trust*, 836 F.2d 1048, 1054 (7th Cir. 1988); *Giardono v. Jones*, 867 F.2d 409, 414 (7th Cir. 1989).[5] Under the Seventh Circuit's standard, a prevailing party should be awarded reasonable attorney's fees "'unless the court finds that the position of the [losing party] was substantially justified or that special circumstances make an

[5] This standard is based upon the Equal Access to Justice Act, 28 U.S.C. § 2412(d)(1)(A).

award unjust.'" *Bittner*, 728 F.2d at 830 (quoting *McDonald v. Schweiker*, 726 F.2d 311, 316 (7th Cir. 1983)); *Van Boxel*, 836 F.2d at 1048; *Giardono*, 867 F.2d at 414. This standard, which contains a "modest presumption" in favor of an award of attorney's fees to a prevailing party, is especially apt when the losing party is a former pension plan trustee, like Foley, who filed a lawsuit seeking pension benefits to which he was not entitled. When a former plan trustee files unmeritorious litigation seeking pension benefits and causes a plan to incur needless litigation expenses, thereby reducing the plan's assets and taking away funds from the other plan beneficiaries or participants, the former trustee-beneficiary should be held accountable.[6] The Court of Appeals for the Third Circuit failed to assess the Plan's claim for attorney's fees in this light.

Under the Seventh Circuit's test, the Plan would be entitled to recover its attorney's fees and costs incurred in defending Foley's case. Foley was a former trustee who was presumed to know the Plan's provisions and requirements for seeking and obtaining pension benefits. Despite having this knowledge, he refused to provide evidence of his entitlement to the additional pension benefits that he sought. Instead, he filed a lawsuit against the Plan and lost that lawsuit on the merits. In finding in favor of the Plan on the merits, the Third Circuit implied that Foley's lawsuit was not substantially justified and did not have a solid basis. Moreover, the facts do not show that any special circumstances existed to make such an award

[6] Foley's lawsuit against the Plan cost each Plan participant or beneficiary more than $200.00 for the Plan's defense costs.

against Foley unjust. Thus, under the Seventh Circuit's standard, the Plan is entitled to recover its attorney's fees.

B. ERISA's Legislative History Supports Petitioner's Request for Attorney's Fees

Although logically the five-factor test should not apply as a determinant of attorney's fee awards to prevailing pension plan defendants, some of these factors are also inapplicable to prevailing defendants in light of ERISA's legislative history. The legislative history of Section 502(g)(1) of ERISA, 29 U.S.C. § 1132(g)(1), reveals that the thrust of an award of attorney's fees in favor of defendants is to protect pension plans against frivolous lawsuits.[7] The Senate's decision to eliminate the requirement that the plaintiff post a bond in the amount of attorney's fees from its version of the ERISA bill,[8] and Congress's decision to

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[7] *Private Pension Plan Reform – Part 1: S. Hearings Before the Subcomm. on Private Pension Plans of the Comm. on Fin.*, 93 Cong. (1973) (statement of Fred E. Seibert, Chairman, Employees Trusts Comm., Trust Div., The Am. Bankers Ass'n); *Welfare and Pension Plan Legislation: Hearings on H.R. 2 and H.R. 462 Before the Gen. Subcomm. on Labor Comm. on Educ. and Labor*, 93 Cong. (1973) (statement of Lauren Upson, Member, Cal. Bankers Ass'n Comm. on Employee Benefit Trusts); *Retirement Income Sec. for Employees Act: S. Hearings Before the Subcomm. on Labor of the S. Labor and Pub. Welfare Comm.*, 93 Cong. (1972) (statement of Henry B. Thielbar, Member, Brd. of Governors of the Inv. Counsel Ass'n of Am.); *STAFF OF THE JOINT COMM. ON INTERNAL REVENUE TAXATION, DIGEST OF TESTIMONY ON PROPOSALS FOR PRIVATE PENSION PLAN REFORM*, 93d Cong. (Comm. Print 1973) (testimony of Leon Shapiro, Counsel, Marine Eng'rs Beneficial Ass'n). *See also Monkelis v. Mobay Chemical*, 827 F.2d 935 (3d Cir. 1987).

[8] *Compare* texts of S.4, 93d Cong. § 605 (1st Sess. 1973), S.1557, 93d Cong. § 9 (1st Sess. 1973) and Introductory remarks of Mr. Javits *with* H.R.2, 93d Cong. § 106 (1st Sess. 1973) and H.R.4200, 93d Cong. § 503 (1st Sess. 1973) (as passed by Senate). *See also Private Pension*

(Continued on following page)

reject suggestions that fees only be awarded to prevailing parties,[9] shows, ultimately, that Congress favored a more neutral standard for awarding fees. Specifically, the original Senate bill provided that:

> [T]he court in its discretion may –
>
> (1) allow a reasonable attorney's fee and costs of the action to any party;
>
> (2) require the plaintiff to post security for payment of costs of the action and reasonable attorney's fees.[10]

Moreover, other suggested language provided that:

> [T]he court in its discretion may:
>
> (A) allow a reasonable attorney's fee and costs of the action to any *successful* party to be paid

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Plan Reform – Part 2: S. Hearings Before the Subcomm. on Private Pension Plans of the Comm. on Fin., 93d Cong. (1973) (statement of John S. Nolan, Law Firm of Arnold & Porter in favor of plaintiff's posting bond); *Retirement Income Sec. for Employees Act* (statement of Thielbar), *supra* n.7.

[9] *Welfare and Pension Plan Legis.: Hearings on H.R. 2 and H.R. 462 Before the Gen. Subcomm. on Labor Comm. on Educ. and Labor*, 93d Cong. (1973) (statement of James E. Mandler, John W. Cooper and Benjamin C. Homola, Representing, Corp. Fiduciaries Ass'n of Ill.); *Retirement Income Sec. for Employees Act: S. Hearings Before the Subcomm. on Labor of the S. Labor and Pub. Welfare Comm.*, 93d Cong. (1972) (statement of The Corp. Fiduciaries Ass'n of Ill.); *Private Pension Plan Reform – Part 1* (statement of Seibert), *supra* n.7; *Welfare and Pension Plan Legislation* (statement of Upson), *supra* n.7.

[10] *See, supra* n.8.

> from the fund or such other source as the court shall determine[.][11]

(emphasis added).

These fee provisions were later rejected and replaced by neutral language. Congress codified the present version of Section 501(g)(1) of ERISA, which states: "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

In spite of this Section's neutral language, the circuit courts of appeals have developed and applied the above-stated five-factor test to guide discretion in awarding fees. However, as stated above, these factors expand upon the neutral balance struck in the legislative history. Some of these factors are inapplicable to prevailing pension plan defendants, improperly favor ERISA plaintiffs and, in fact, do nothing to prevent frivolous suits.[12]

Factors two and four relating to the offending party's ability to satisfy an award and the benefits conferred on members of the plan as a whole, respectively, do not promote the express legislative goals supporting an award of attorney's fees to successful plan defendants. An inquiry into a party's ability to pay does nothing to prevent frivolous cases. For example, if a person has no ability to pay, that person will not be deterred from filing baseless claim after baseless claim because that person will have nothing to lose by proceeding in court.

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[11] *Private Pension Plan Reform – Part 1* (statement of Seibert), *supra* n.9; *Welfare and Pension Plan Legislation* (statement of Upson), *supra* nn.7, 9.

[12] *Monkelis v. Mobay Chem.*, 827 F.2d 935, 936 (3d Cir. 1987).

Similarly, nothing in the legislative history provides support for awarding fees based on the benefits to other "members of the plan." As stated above, the focus of this factor is on the benefit that a plaintiff's claim has on the plan's beneficiaries, such as a court decision establishing a new standard for determining entitlement to pension benefits. Thus, this factor does not prevent frivolous suits in any way and is in fact irrelevant to ERISA's legislative purpose. The circuit courts have applied these factors to prevailing pension plan defendants despite the fact that these factors are not supported by this Section's legislative history.

The only remedy therefore, is to discard those aspects of the test that are inconsistent with the Section's legislative history. The only factors, if any, that arguably should remain are: (1) bad faith or culpability of the offending party,[13] (3) deterrent effect, and (5) the merits of the parties' position, as these are the only factors that are neutral and prevent frivolous suits that constitute an improper expense on plan assets.

Here, Petitioners should be awarded attorney's fees because the Third Circuit has already implied that Foley's case was unmeritorious. The Third Circuit found that Foley "was not similarly situated with other rank and file Union members who had been granted the benefit of the exception."[14] Indeed, the court recognized that Foley had

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[13] This factor is only applicable if the Court finds that phrase "offending party" does not solely refer to defendants.

[14] *Foley v. Int'l Bhd. of Elec. Workers Local Union Pension Funds, et al.*, 271 F.3d 551, 558 (3d Cir. 2001).

been a prior trustee of the Plan.[15] Moreover, the court found that: (1) Foley had personally appointed the trustees to the Plan, who spoke on his behalf and voted for his extra benefits; (2) Foley's case was the only one ever raising issues of impropriety; (3) no other employees' entitlements to benefits had been challenged; and (4) the committee that investigated Foley's improprieties had no evidence to show that work had not been available to Foley during the years in question, and Foley did nothing to provide such evidence.[16] Instead, Foley, as a former fund fiduciary, who had to have understood entitlements under the Plan, pursued legal action against the Plan and lost this case.[17]

An award of attorney's fees against Foley in his capacity as a former Plan fiduciary will deter other plan fiduciaries (who are plan insiders) from filing meritless lawsuits seeking pension or other benefits to which they are not entitled, thereby requiring the Plan to expend money to defend these baseless claims. Moreover, such an award will promote another purpose of ERISA – "to protect the interests of plan beneficiaries and participants" – because the Plan's coffers may be replenished with an award of attorney's fees to prevailing pension plan defendants. *Gray*, 792 F.2d at 259.

Based upon the above, this Court should clarify the inconsistent positions taken by the circuit courts and set forth the standards to be utilized in determining when a

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[15] *Id.*

[16] *Id.*

[17] *Id.* at 554.

prevailing pension plan defendant may recover its attorney's fees and costs under ERISA from a former plan trustee.

CONCLUSION

It is respectfully requested that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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NOT PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.: 02-2403

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NEILSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLEY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM C. RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY BRADLEY, in his capacity as a TRUSTEE, FRED J. COMPTON

International Brotherhood of Electrical Workers Local Union 98 Pension Fund; John J. Dougherty in his capacity as a Trustee; Edward Neilson in his capacity as a Trustee; Joseph Agresti in his capacity as a Trustee; Thomas J. Reilly, Jr. in his capacity as a Trustee; Dennis Link in his capacity as a Trustee; William C. Rhodes in his capacity as a Trustee; Roy Dantz in his capacity as a Former Trustee; Larry Bradley in his capacity as a Former Trustee,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil No. 98-CV-00906)
District Court Judge: Hon. Lowell A. Reed, Jr., Senior Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 3, 2003
(Filed: April 11, 2003)

Before: McKEE, SMITH and HOCHBERG,* Circuit Judges

OPINION OF THE COURT

PER CURIAM.

The defendants appeal the district court's order denying their motion for attorneys' fees and costs under §502(g)(1) of the Employee Retirement Income Security Act, 29 U.S.C. §1132(g) ("ERISA"). The defendants' request for fees and costs arises out of their successful defense against the plaintiff's claim that he was denied 12.5 years of pension benefits that had accrued prior to a break in service in employment which was covered by the pension plan. Inasmuch as the district court has already set forth the factual and procedural history of the case, it is unnecessary to repeat that history here. *See Foley v. International Brotherhood of Electrical Workers Local Union 98 Pension Fund, et al.*, 2002 WL 734340, *1 (E.D. Pa. 2002). Moreover, the district court, in its Memorandum and Order carefully applied the correct legal standard guiding the court's exercise of discretion in awarding attorneys' fees under ERISA, announced in *Ursic v. Bethlehem Mines*, 719 F.2d 670, 673 (3d Cir. 1983), to the

* The Honorable Faith Hochberg, District Judge for the District of New Jersey, sitting by designation.

facts of this case.[1] Accordingly, we hold that the court properly denied the defendant's motion for attorneys' fees. Moreover, given the district court's thoughtful discussion, no purpose will be served by this court undertaking a redundant analysis simply to arrive at the same result.

Therefore, we will affirm the decision of the district court substantially for the reasons set forth in the district court's Memorandum Opinion without further elaboration.

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[1] We review the district court's award or denial of attorney's fees for abuse of discretion. *Ellison v. Shenango Inc. Pension Bd.*, 956 F.2d 1268, 1273 (3d Cir. 1992). Our review of the legal standards a district court applies in the exercise of its discretion is plenary. *Id.*

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No.: 02-2403

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NEILSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLEY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM C. RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY BRADLEY, in his capacity as a TRUSTEE, FRED J. COMPTOM

International Brotherhood of Electrical Workers Local Union 98 Pension Fund; John J. Dougherty in his capacity as a Trustee; Edward Neilson in his capacity as a Trustee; Joseph Agresti in his capacity as a Trustee; Thomas J. Reilly, Jr. in his capacity as a Trustee; Dennis Link in his capacity as a Trustee; William C. Rhodes in his capacity as a Trustee; Roy Dantz in his capacity as a Former Trustee; Larry Bradley in his capacity as a Former Trustee,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(Civil No. 98-CV-00906)
District Court Judge: Hon. Lowell A. Reed, Jr., Senior Judge

Submitted Pursuant to Third Circuit LAR 34.1(a)
April 3, 2003

Before: McKEE, SMITH and HOCHBERG,[1] Circuit Judges

This cause came to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on April 3, 2003.

On consideration whereof, it is hereby ORDERED AND ADJUDGED by this Court that the judgment of the said District Court entered on April 24, 2002, be, and the same is hereby affirmed. All of the above in accordance with the opinion of this court. Costs taxed against appellant.

ATTEST

/s/ Marcia M. Waldron

Clerk

Dated: April 11, 2003

[1] The Honorable Faith Hochberg, District Judge for the District of New Jersey, sitting by designation.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. FOLEY, SR.	:	**CIVIL ACTION**
Plaintiff,	:	
v.	:	
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et al.,	:	
Defendants.	:	**NO. 98-906**

ORDER

AND NOW this 23rd day of April, 2002, upon consideration of the motion of defendants for allowance of attorneys' fees and costs under the Employee Retirement Income Security Act, 29 U.S.C. § 1001, *et seq.* ("ERISA") (Doc. No. 91), plaintiff's response (Doc. No. 92), and the reply thereto (Doc. No. 93), and having concluded, for the reasons stated in the foregoing memorandum, that the record supports the exercise of this Court's discretion against defendants; the defendants are thus not entitled to attorneys' fees or costs under ERISA therefore, **IT IS HEREBY ORDERED** that the motion of defendants is **DENIED**.

/s/ Lowell A. Reed, Jr.
LOWELL A. REED, JR., S.J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

EDWARD J. FOLEY, SR.,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND, et. al.,	:	NO. 98-906
Defendants.	:	

Reed, S.J. **April 23, 2002**

MEMORANDUM

(Filed Apr. 24, 2002)

Now before the Court is the motion of defendants for attorneys' fees and costs under the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1132(g). For the reasons set forth below, the motion of defendants will be denied.

Background

The following is an edited summary of the factual background of this action previously provided in this Court's Opinion of December 7, 2000. *See Foley v. IBEW Local Union 98 Pension Fund,* 2000 U.S. Dist. LEXIS 17769 at **2-3 (E.D. Pa. Dec. 7, 2000) ("Foley III"). Plaintiff had brought this action under the Internal Revenue Code ("IRC"), the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401 *et seq.* ("LMRDA") and ERISA, alleging that he was denied 12.5 years of

pension benefits he had accrued prior to a break in service in employment that was covered by the International Brotherhood of Electrical Workers Union Local 98 ("Local 98") pension plan (employment in the electrical industry). The pension fund trustees had denied plaintiff's request for eligibility under an exception to the plan's break-in-service provision, under which plan members who meet certain criteria may receive credits accrued prior to a break in service.

This Court granted summary judgment in favor of defendants on plaintiff's claims under the IRC and the LMRDA, ruling that plaintiff's free speech rights were not violated by the union defendants and that the pension fund trustees did not improperly amend the pension plan; nevertheless, the Court denied summary judgment as to plaintiff's ERISA claims. *See Foley v. IBEW Local Union 98 Pension Fund,* 91 F. Supp. 2d 797 (E.D. Pa. 2000) (*"Foley I"*). Following a non-jury civil trial on August 21 and 22, 2000, this Court found that plaintiff was treated differently from all other persons similarly situated in that his petition for eligibility under the break-in-service exception was subjected to a more demanding evidentiary standard and a stricter level of scrutiny than the petitions of those similarly situated to him. *See Foley v. IBEW Local Union 98 Pension Fund,* 112 F. Supp. 2d 411 (E.D. Pa. 2000) (*"Foley II"*). The Court therefore concluded that the trustees' decision to deny plaintiff his accrued pension benefits was arbitrary and capricious, and that plaintiff was entitled to a recovery of benefits under ERISA, 29 U.S.C. § 1132(a)(1)(B), and granted judgment in favor of Foley and against the pension fund in the amount of $99,624.65. *See id.* at 416. Upon plaintiff's further motion, the Court granted plaintiff attorneys' fees under ERISA in

the amount of $122,604.49. *Foley III,* 2000 U.S. Dist. LEXIS 17769 at *18.

The judgment in favor of Foley and the attorneys' fees award were subsequently reversed by the Third Circuit Court of Appeals, which determined that notwithstanding the past practice of the Trustees in treating persons similarly situated to plaintiffs, the Trustees acted in a responsible manner consistent with their obligations as fiduciaries. *See Foley v. IBEW Local Union 98 Pension Fund,* 271 F.3d 551, 559 (3d Cir. 2001). Defendants now seek attorneys' fees from plaintiff under ERISA.

Legal Standard

Under ERISA, a court may, in its discretion, award "reasonable" attorneys' fees to either party. *See* 29 U.S.C. § 1132(g)(1).[1] While the statute itself offers no criteria to guide a court's exercise of its discretion, the Court of Appeals for the Third Circuit has used the following five-factor test for determining whether an award of fees to a prevailing party is warranted under Section 1132(g)(1):

(1) the offending parties' culpability or bad faith;

(2) the ability of the offending parties to satisfy an award of attorneys' fees;

(3) the deterrent effect of an award of attorneys' fees against the offending parties;

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[1] The statute provides, "In any action under this subchapter . . . by a participant . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

(4) the benefit conferred on members of the pension plan as a whole; and

(5) the relative merits of the parties' positions.

See Ursic v. Bethlehem Mines, 719 F.2d 670, 673 (3d Cir. 1983). According to the Third Circuit Court of Appeals, district courts must articulate their analyses and conclusions as to each of the five factors. *See Anthuis v. Colt Indus. Operating Corp.,* 971 F.2d 999, 1012 (3d Cir. 1992).

A. Culpability or Bad Faith and the Relative Merits of the Parties' Positions

The first *Ursic* factor does not require a finding of bad faith or ulterior or sinister purpose. *See McPherson,* 33 F.3d at 256-57. A court can find against a party on the first factor when the conduct at issue involved blameable conduct that constituted "something more than simple negligence." *Id.* at 257. Thus, the first and fifth *Ursic* factors are related. Where plaintiff's claim is patently without merit under the fifth factor, then the Court may find bad faith or culpability under the first.

Defendants argue that Foley's conduct in pursuing the pension benefits at issue constituted both bad faith and culpable conduct. To support their argument, they point to Foley's position as a trustee of the Fund and his decision to litigate the case after the subcommittee investigation determined that plaintiff had submitted insufficient evidence of his availability to work between 1972 and

1981.[2] They further argue that plaintiff's pursuit of the litigation over six years was meritless, and therefore constitutes culpable conduct.

Although the Third Circuit Court of Appeals concluded that the Fund did not act in an arbitrary and capricious manner with regard to plaintiff, this conclusion does not militate in favor of an award of fees. "[A] losing party is not culpable merely because it has taken a position that did not prevail in litigation." *McPherson,* 33 F.3d at 257. This Court found substantial evidence supporting plaintiff's position that he was treated in a different manner than those similarly situated to him. As stated in the Confidential Report by the Investigative Subcommittee of the Fund that found a lack of evidence supporting Foley's pension status, "[t]here is nothing unique as to Mr. Foley's case. Almost all of the other participants who received the benefit of the available for work-no work available exception had similarly sketchy employment information that was made available to the Trustees." *Foley II,* 112 F. Supp. 2d at 413. Additionally, defendants set forth no evidence showing that the Trustees ever formed a subcommittee to investigate any other plan participant's pension application or required a person to produce additional evidence of their availability for work

[2] Defendants also argue that certain other "steps" taken by plaintiff evidence bad faith, but, with the exception of the purported (and unverified) quotation of plaintiff's counsel to the press, defendants fail to cite to any part of the record that might support the existence of these steps. Additionally, as plaintiff persuasively argues, neither the refusal of plaintiff to sign the affidavit in support of the factual assertions submitted in his deposition, nor counsel's statement to the press after judgment was rendered, constitute proof of bad faith.

under the break-in-service exception, as the Plan had required from plaintiff. *See id.* Where courts have awarded fees and expenses to prevailing defendants, the lack of any merit to the plaintiffs' arguments was clear. *See Monkelis v. Mobay Chem.*, 827 F.2d 935, 936-37 (3d Cir. 1987) (awarding fees where claim was time-barred, plaintiff set forth no factors to support claim of termination to prevent pension from vesting, plaintiff had five more years before pension vested, and facts of case were previously litigated in wrongful discharge action in state court); *Tobin v. General Elec. Co.*, C.A. No. 95-4003, 1998 U.S. Dist. LEXIS 693 at **8-9 (E.D. Pa. Jan. 26, 1998) (denying motion for reconsideration) (awarding partial fees where plaintiff maintained claim against individual CEO of company despite uncovering no supporting evidence during discovery). By contrast, where the dispute is rooted in different but reasonable interpretations of undisputed facts, a claim is not so groundless as to support an inference of culpability. *See Tobin v. General Elec. Co.*, C.A. No. 95-4003, 1996 U.S. Dist. LEXIS 18645 at **6-7 (E.D. Pa. Dec. 11, 1996) (denying partial fees where validity of plaintiff's claim depended on interpretation of plan provision). I find that plaintiff's pursuit of his ERISA claim in the instant action, although ultimately rejected, was with facial merit and did not constitute bad faith or culpable conduct.

Although defendants argue that they should at least be awarded attorneys' fees for the unsuccessful claims brought by plaintiff under the IRC and the LMRDA, these claims involved a common core of facts as, and were based on legal theories related to, plaintiff's ERISA claim. Thus, any fee breakdown on a claim-by-claim basis would be extraordinarily difficult, and defendants have not attempted to do so. *Cf. Hensley v. Eckerhart*, 461 U.S. 424,

436, 103 S. Ct. 1933, 761 L. Ed. 2d 40 (1983) (fee awards to prevailing plaintiffs should not be reduced because of unsuccessful claims unless such claims were distinct, based on different facts and legal theories). Accordingly, because the Court finds that the IRC and LMRDA claims were related to plaintiff's ERISA claim, the Court is not persuaded by defendants' arguments.

B. Ability to Pay

A plaintiff's inability to pay an award of attorneys' fees by itself may be a sufficient basis to deny a motion by a prevailing defendant for fees. *See Tobin,* 1996 U.S. Dist. LEXIS 18645 at *11 (citing *Marquadt v. North Am. Car Corp.,* 652 F.2d 715, 718-19 (7th Cir. 1981)). Although plaintiff has attached no supporting affidavit reflecting his financial status, plaintiff argues that he cannot afford the fees requested. The record reflects that plaintiff retired in 1996 and receives $1,387.43 in accumulated monthly pension benefits. *Foley II,* 112 F. Supp. 2d at 412, 416. Although defendants have asked for discovery to determine whether plaintiff would be able to pay the attorneys' fees, there is no indication that plaintiff would be likely to afford the $420,777.00 requested. Any further discovery would only increase the amount of attorneys' fees for defendants, and is unlikely to uncover an unexpected source of income for the plaintiff. I find that it is likely that plaintiff would not have the funds to pay the attorneys' fees at issue. In view of the weight of the other factors in favor of plaintiff, further inquiry on this subject is unwarranted.

C. Deterrent Effect

An award of attorneys' fees in this case would have a detrimental, not a beneficial, deterrent effect. As explained above, plaintiff's claim that the Fund treated him differently than it treated others similarly situated was not speculative nor meritless. Deterring those with reasonable claims from litigating their actions would not further the goals of ERISA. Therefore, I conclude that this factor weighs in plaintiff's favor.

D. Benefit to Plan Members

An award of attorneys' fees in this case will not benefit other plan members or any issue of policy. Thus, this factor does not weigh in defendants' favor.

Conclusion

My consideration of the five factors reveals that the first, second, third, and fifth factors support the denial of the motion by defendants for attorneys' fees and costs, and consideration of the fourth factor does not benefit defendants. Therefore, having made the foregoing findings and conclusions, the Court exercises its discretion herewith and the defendants' request for attorney's fees and costs under § 1132(g)(1) will be denied.

An appropriate Order follows.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2767 and 00-4427

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NIELSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY J. BRADLEY, in his capacity as a TRUSTEE; FRED J. COMPTOM

International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty, in his capacity as a Trustee, Edward Nielson, in his capacity as a Trustee, Joseph Agresti, in his capacity as a Trustee, Thomas J. Reilly, Jr., in his capacity as a Trustee, Dennis Link, in his capacity as a Trustee, William C. Rhodes, in his capacity as a Trustee, Roy Dantz, in his capacity as a Former Trustee, and Larry Bradley, in his capacity as a Former Trustee
(Collectively the "Defendants"),

Appellants in No. 00-2767

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 98 OF AMERICA; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NIELSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LAWRENCE J. BRADLEY, in his capacity as a TRUSTEE,

Appellants in No. 00-4427

and FRED COMPTON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-906)
District Judge: Honorable Lowell A. Reed, Jr.

Argued October 9, 2001

BEFORE: SCIRICA, GREENBERG,
and COWEN, *Circuit Judges*

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued on October 9, 2001.

On consideration whereof, it is now hereby ADJUDGED and ORDERED by this court that the judgment of the district court entered August 29, 2000, and the order of the district court entered December 8, 2000, be and the same are hereby reversed and the case is remanded to the district court to enter judgment for the defendants.

Costs taxed against the appellee.

ATTEST:
/s/ Marcia M. Waldron
Marcia M. Waldron, Clerk

DATED: November 8, 2001

Filed November 8, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2767 and 00-4427

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NEILSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY BRADLEY, in his capacity as a TRUSTEE; FRED J. COMPTOM

International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty in his capacity as a Trustee, Edward Nielson, in his capacity as a Trustee, Joseph Agresti, in his capacity as a Trustee, Thomas J. Reilly, Jr., in his capacity as a Trustee, Dennis Link, in his capacity as a Trustee, William C. Rhodes in his capacity as a Trustee, Roy Dantz in his capacity as a Former Trustee, and Larry Bradley, in his capacity as a Former Trustee (Collectively the "Defendants"),

Appellants in No. 00-2767

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 98 OF AMERICA; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NEILSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LAWRENCE J. BRADLEY, in his capacity as a TRUSTEE,

Appellants in No. 00-4427

and FRED COMPTON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-906)
District Judge: Honorable Lowell A. Reed, Jr.

Argued October 9, 2001

Before: SCIRICA, GREENBERG, and COWEN,
Circuit Judges

(Filed November 8, 2001)

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

This matter comes on before this court on appeal from an order of the district court entering judgment in favor of appellee Edward J. Foley, Sr., and against the International Brotherhood of Electrical Workers Local Union 98

Pension Fund (the "Pension Fund" or the "Fund").[1] Foley claims that the Pension Fund's Board of Trustees ("Trustees") improperly declined to grant him an exception to the pension Plan's service eligibility provisions that would have permitted him to receive a higher level of benefits than that to which he otherwise was entitled. Following a bench trial, the district court concluded that the Trustees arbitrarily and capriciously declined to apply the exception to Foley in the manner they had applied it to other employees seeking its benefit. Thus, it entered judgment in his favor on August 29, 2000. Appellants assert that the district court, when reviewing the Trustees' decision, erred in its application of the arbitrary and capricious standard, as Foley was not similarly situated to other employees to whom the Trustees had applied the exception. Appellants also appeal the district court's subsequent award of attorneys' fees to Foley by order of December 8, 2000. For the reasons set forth below, we will reverse the district court's judgment on the merits and, accordingly, we also will reverse the award of attorneys' fees.

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[1] There is some question as to which of the defendants the district court entered judgment against. While the court apparently intended to enter judgment only against the Fund, and the district court docket reflects this disposition, the individual defendants nevertheless have appealed. Inasmuch as we conclude that Foley was not entitled to a judgment against any of the defendants, the question is of no practical significance. However, as a matter of convenience, we will treat all the individual defendants except Fred Compton as appellants, as they in fact appealed.

I. BACKGROUND

Foley is the former President of the International Brotherhood of Electrical Workers Local 98 (hereinafter "the Union") and a former Trustee of the Union's Pension Fund. He worked in covered employment for Fund pension purposes, *i.e.*, employment in the electrical industry, from 1959 until his employer laid him off in 1971. Then, from 1972 through 1980, Foley worked in his family's tire business, returning to employment in the electrical industry in 1981. Following his return to the electrical industry, Foley was elected the Union's President and he served as a Trustee of the Pension Fund from 1987 through July 1996. In July 1996, Foley retired and sought pension benefits.

Under the Plan provisions, Foley forfeited all credited service earned prior to his return to work in 1981 because of a break-in-service provision which provided, in the years applicable to Foley, that accrued pension credits lapsed when a Plan participant did not work 600 hours in covered employment for a consecutive two-year period. There is, however, an exception to the break-in-service provision, known as the available-for-work exception, wherein the Plan provides that an employee shall not forfeit credited service if he was continuously available for work within the jurisdiction of the Union and unable to obtain covered employment.[2] Based on this exception, in

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[2] The relevant Plan provision states:

> Notwithstanding anything to the contrary in paragraph (a) and (b), an employee shall not have forfeited any of his Credited Service (past or future) or the right to any death benefit regardless of his number of years of credited service if:

(Continued on following page)

1988, shortly after Foley began his tenure as Trustee, the Trustees agreed to excuse his break-in-service pursuant to their understanding that work had not been available to him in covered employment from 1972 to 1980.

On October 28, 1994, however, Fred Compton, a former Union president and Trustee, sent Laurance Baccini, counsel to the Pension Fund, a letter stating that the 1988 decision was incorrect because the Trustees at that time based their decision on fabricated information improperly skewed in Foley's favor. Upon receipt of Compton's letter, the Trustees appointed a subcommittee to investigate Compton's allegations. Then, in February 1995, based on the subcommittee's recommendations, the Trustees reversed the 1988 decision because they concluded that there was insufficient evidence to substantiate Foley's claim that work was unavailable and that he was available for covered employment in the 1972-1974 period.

In July 1996, Foley applied for pension benefits but, based upon their 1995 decision, the Trustees denied his application insofar as it sought credits for the period between 1959-1971. Foley appealed but was not successful as the Trustees determined that he still had not presented sufficient information to establish his entitlement to credit for the disputed years of credited service.

On February 23, 1998, Foley commenced this action under the Employee Retirement Income Security Act, 29

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(1) he was continuously available for work within the jurisdiction of the Union and was unable to obtain covered employment.

Article I, Definitions, Section C "Break in Service" (c)(i).

U.S.C. § 1001, *et seq.* ("ERISA"), in particular 29 U.S.C. §§ 1132(a)(1)(B) and (a)(3), which action, as subsequently amended, named the Fund, the Union, the Trustees, and various Union officers as defendants. In his complaint Foley asserted that the Trustees improperly applied a more demanding evidentiary standard to him than to other employees who had been granted an exception to the break-in-service provision notwithstanding a provision in the Plan that all "interpretations and decisions shall be applied in a uniform manner to all Employees similarly situated." In addition to his ERISA claims, Foley also asserted claims under the Labor Management Reporting and Disclosure Act of 1974, 29 U.S.C. § 401 *et seq.*, ("LMRDA"), and the Internal Revenue Code, 26 U.S.C. §§ 411 and 412. Following the parties' cross-motions for summary judgment, the district court dismissed all but Foley's ERISA claims. *See Foley v. IBEW Local Union 98 Pension Fund*, 91 F. Supp. 2d 797 (E.D. Pa. 2000).[3] We make no further reference to the dismissed claims, as Foley has not cross-appealed from their dismissal and has not asserted that we should affirm on the basis of these claims.

After a bench trial in August 2000, the district court found that the Trustees arbitrarily and capriciously acted contrary to the terms of the Plan when they denied Foley credit for time during his employment in the electrical industry prior to his 1971 layoff. *See Foley v. IBEW Local Union 98 Pension Fund*, 112 F. Supp. 2d 411, 416-17 (E.D.

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[3] Foley included Compton as a defendant but the parties later dismissed the action against him by stipulation. He is not a party on this appeal.

Pa. 2000) ("*Foley*"). On August 29, 2000, the court entered judgment against appellants, and on December 8, 2000, entered an order granting Foley's motion for attorneys' fees. *See Foley v. IBEW Local Union 98 Pension Fund*, No. Civ. A. 98-906, 2000 WL 1801273 (E.D. Pa. Dec. 7, 2000). Appellants have timely appealed from the judgment and order.[4]

II. STANDARD OF REVIEW

We reverse factual conclusions of the district court only if they are clearly erroneous, *see* Fed.R.Civ.P. 52(a), but exercise "plenary review over the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts." *Orvosh v. Program of Group Ins. for Salaried Employees of Volkswagen of Am.*, 222 F.3d 123, 129 (3d Cir. 2000) (citation and internal quotation marks omitted). Where, as here, the plan administrator has discretion to interpret the Plan and the authority to determine eligibility, we review a denial of benefits under an "arbitrary and capricious" standard. *Id.* Under this standard:

> a plan administrator's decision will be overturned only if it is clearly not supported by the evidence in the record or the administrator has failed to comply with the procedures required by the plan. A court is not free to substitute its own judgment for that of the defendants in determining eligibility for plan benefits.

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[4] The district court had jurisdiction over this matter pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331 and we have jurisdiction under 28 U.S.C. § 1291.

Orvosh, 222 F.3d at 129 (internal quotations and citations omitted).[5] Further, "the district court cannot, by couching a legal conclusion as a finding of fact, prevent appellate review of legal errors." *Louis W. Epstein Family P'ship v. Kmart Corp.*, 13 F.3d 762, 766 (3d Cir. 1994) (citation and internal quotation marks omitted).

III. DISCUSSION

The Trustees denied Foley credit for the disputed years of service because the subcommittee's investigation demonstrated that work had been plentiful between 1972 and 1974, but that Foley was unavailable for work during that period due to his employment in the family tire business. The Trustees also found that Foley failed to produce any evidence supporting his claim.

Under the "arbitrary and capricious" standard of review, the district court was bound to affirm this decision if it was not contrary to the Plan's terms and was rationally related to a legitimate Plan purpose. *See Orvosh*, 222 F.3d at 129-31. The district court determined that although the Trustees believed in good faith that they were treating Foley the same as any other applicant seeking the benefit of the break-in-service exception, they actually treated him differently from other employees similarly situated in that they arbitrarily and capriciously subjected his application to a more demanding evidentiary standard

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[5] Foley unsuccessfully argued in the district court that the court should review the Trustees' decision on a *de novo* basis but he does not make that contention on this appeal.

and a stricter level of scrutiny than those of other employees. *See Foley*, 112 F. Supp. 2d at 416. A district court, however, may not substitute its judgment for that of a plan's trustees in determining a claimant's eligibility for benefits, and, as we discuss below, the record demonstrates that the Trustees here did not arbitrarily and capriciously treat Foley as not being similarly situated to other employees to whom the exception to the break-in-service rule had been applied.

The record shows that during a Trustees' meeting in 1979, they determined that Foley forfeited the credits he earned from 1959-1971 as he had a two-year break in service as of 1973. In 1984, when, after resuming employment in the electrical industry, Foley inquired as to the status of those credits, Compton informed him that they had been forfeited and that it was "too late" to save them.

In 1988, six months after Foley was elected President of the Union, he appointed himself, Paul Gilmore, and James Mackin to three of the six positions on the Fund's Board of Trustees. Shortly thereafter, the Board of Trustees granted Foley credits for the years 1959-1971, reversing its prior forfeiture of his credits even though he had not applied formally for their reinstatement. Indeed, Foley did not present documentary evidence to support the award of credits at the time he was awarded the credits. Instead, Mackin and Gilmore spoke on Foley's behalf, and the Trustees appear to have accepted their statements as true. The record shows, however, that Mackin and Gilmore did not have first hand knowledge of the germane facts as they had not been employed full time in the electrical industry during the 1972 to 1974 period.

In October 1994, however, the Trustees received Compton's letter, "seriously question[ing]" the 1988 decision and stating that "the [1988] pension trustees may have been either misled or misinformed" when they reinstated Foley's credits. Confronted with this formal written challenge, the Trustees determined that they were obliged to review the facts and, accordingly, created the subcommittee to investigate the issues Compton raised in his letter.

The subcommittee rendered its report in late 1994 or early 1995. It found that work opportunities were "plentiful" from 1971 through 1974 and, according to the record available to it, the hours electricians worked during that period evidenced "full employment, a few visiting brothers working and a decent amount of overtime." The subcommittee also determined that the Trustees in 1988 primarily relied on Gilmore's statement that Foley was available for work but Gilmore admitted to the subcommittee that he knew only of Foley's availability after 1975. The subcommittee interviewed Foley, who stated that he went into the family business in 1972 and periodically checked to see if electrical work was available.

We recognize that the subcommittee noted that the lack of evidence supporting Foley's alleged availability for work in the electrical industry and inability to find work was not "unique" and that the "available for work-no work available" exception had been applied liberally. In fact, the subcommittee's report included a list showing each case in which the exception had been applied since 1980. Consequently, the subcommittee recommended that the Trustees construe the exception more strictly than they had in the

past and that if they did so in Foley's case, they also should "examine" the included list, making "appropriate adjustments." *Id.* at 254 255.[6]

In February 1995, following their review of the subcommittee's report, the Trustees unanimously voted to remove the credited service from Foley's pension record but advised him that at any time he could submit a request for reconsideration attaching relevant documentation. The Trustees also resolved to reinvestigate all other individuals to whom the "available for work-no work available" exception had been applied. *See Foley*, 112 F. Supp. 2d at 413.

In July 1996, when Foley applied for benefits, he did not submit additional information supporting a credit for service from 1959 to 1971. Accordingly, the Trustees awarded Foley pension benefits taking into account his

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[6] According to the list, in addition to Foley, 20 other employees applied for the benefit of the exception, only one unsuccessfully. Eight who were successful had signed the Union's "out-of-work" book signaling their availability for work. In three cases, the Trustees testified as to having first hand knowledge as to each employee's availability for work and in three other cases the employees had constant contact with the Union, and one submitted a letter detailing his work history.

The district court found these distinctions from Foley's case "not meaningful or persuasive." *Foley*, 112 F. Supp. 2d at 414 n.2. It pointed out that during the period at issue, 1972-1974, a time that the Trustees found that work opportunities were plentiful, nine employees had been granted the "available for work-work not available" exception. *Id.*

However, of these nine, only two met the exception during 1973, and the remaining seven could not find work from 1974-1975. Most of those who could not find work in 1974-1975 were out-of-town workers who signed the out-of-work book. Of the two that met the exception in 1973, the Trustees had first hand knowledge of both employees' record.

break in service. Foley appealed the decision, but the Trustees concluded that they had "insufficient evidence as to the unavailability of work and Mr. Foley's inability to obtain covered employment during the Plan years 1972, 1973 and 1974."

The district court found that the Trustees acted in good faith and believed they did not treat Foley differently than other employees. *Foley*, 112 F. Supp. 2d at 415. However, the court determined that the Trustees actually held Foley to a stricter standard "than any other individual in like circumstances," *id.*, arbitrarily and capriciously violating their duty to interpret the Plan and apply decisions "in a uniform manner to all Employees similarly situated." *Id.* at 416 (citation omitted).

The district court made much of the fact that the Trustees appointed the subcommittee to investigate the circumstances under which Foley had been granted the exception in 1988, yet failed to form a subcommittee to examine "any other plan participant's pension application." *Foley*, 112 F. Supp. 2d at 415. As the district court recognized, however, the allegations of impropriety that Compton raised in his letter "justified a review of plaintiff's claim to determine whether there was any impropriety." *Id.* at 414 n.2. Thus, given the allegations of impropriety in the Compton letter, and in light of their fiduciary duties to the Fund, the Trustees reasonably and appropriately appointed the subcommittee in Foley's case.

The district court next took issue with the actions the Trustees took upon receipt of the subcommittee's report. *See id.* The court seems to have been of the view that because the investigation yielded "no evidence of wrongdoing or deceit," the Trustees were bound to grant Foley's

application for benefits as they had with "a number of individuals who sought refuge under the break-in-service exception . . . who, like Foley, produced a minuscule amount of evidence." *Id.* The court also seemed frustrated with the fact that the Trustees had not conducted an investigation with respect to the other employees who were granted the benefit of the exception. *Id.* at 415. These cases differed from Foley's, however, in that these employees' eligibility for the exception never was challenged. Further, the subcommittee did not uncover any evidence suggesting that any of them acquired pension credits through improper means.[7]

In essence, the court held that because Foley was "similarly situated" to other employees who had benefitted from a liberal interpretation of the available-for-work exception, the Trustees' failure to award him the break-in service credits was "arbitrary and capricious." *Foley*, 112 F. Supp. 2d at 416. The premise of the court's decision was, however, erroneous as Foley was not similarly situated to rank and file Union members who had been granted the benefit of the exception. Rather, he was a Trustee when he sought to have service credits added to his pension record, and he appointed the Trustees who spoke on his behalf and apparently voted to grant him the benefit of the exception. Moreover, Foley's case was the only one under the available-for-work exception where issues of impropriety were raised, and his case was the only one in which the employee's entitlement to benefits under the exception was

[7] Apparently, the Trustees referred the matter to the Fund professionals for follow-up. Several individuals who were granted the benefit of the exception now are deceased. *See* Appellants' Br. at 34.

challenged. Furthermore, upon review of the subcommittee's report, the Trustees recognized that they did not have evidence to support the application of the exception to Foley.

It is also significant that at a time that he should have been "continuously available for work" in order for his break in service to be excused, Foley was engaged in the family tire business and thus had an incentive not to work in the electrical industry. When the district court made its determination that the Trustees acted arbitrarily and capriciously, it should have recognized that this circumstance distinguished Foley's case from those of other supposedly "similarly situated" employees who were granted the benefit of the exception, as Foley made no showing that they had incentives equivalent to his to eschew employment in the electrical industry. In the circumstances, it cannot reasonably be held that the Trustees arbitrarily and capriciously treated Foley differently from other employees similarly situated, and thus the district court erred in reaching its result.

We emphasize that in focusing on the fact that credit under the available-for-work exception had been granted liberally in the past rather than examining whether the Trustees' decision was contrary to Plan language or whether it was rationally related to a legitimate Plan purpose, the district court did not properly credit significant evidence. This evidence included the subcommittee's finding that work was plentiful from 1972-1974, the Trustees' own recollections and understanding regarding the availability of work during that time, Gilmore's admission to the subcommittee of his lack of knowledge of the germane facts, Foley's failure to present evidence, and the circumstances in which Foley was originally granted the

exception. The court, however, should have relied on this evidence as it was not free to substitute its judgment for that of the Plan administrators. *See Orvosh*, 222 F.3d at 129.

Moreover, the district court's holding binds the Trustees to a result that was a consequence of poor administrative practices, that the Trustees later corrected. In effect, the district court's decision improperly "straitjackets" the Trustees into granting benefits simply because of their past practices. *See Oster v. Barco of Cal. Employees' Ret. Plan*, 869 F.2d 1215, 1219 (9th Cir. 1988) (holding that prior record of granting requests is insufficient to establish that committee denied request in arbitrary and capricious manner and stating "[t]o hold otherwise would impair the flexibility necessary for proper financial management of such plans, a goal of Congress in holding ERISA fiduciaries to the 'prudent man' standard") (citation and internal quotation marks omitted). *See also Nazay v. Miller*, 949 F.2d 1323, 1336 (3d Cir. 1991) (plan administrator's decision not to waive requirement "was neither arbitrary nor capricious and did not constitute an abuse of discretion" where plan administrator waived requirement on 14 previous occasions). We are particularly troubled by the fact that the district court effectively read the break-in-service forfeiture provision out of the Plan, as under the court's conclusions it is difficult to see how it ever could be applied in the face of an employee's claim that he is entitled to the benefit of the exception.[8]

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[8] Foley argues that the Trustees did not raise a "straightjackets" argument in the district court. We are satisfied, however, that they sufficiently made the contention to preserve it for this appeal.

The district court's opinion also is problematical for another quite fundamental reason. While we know that the break-in-service exception was excused in 20 other cases in which employees claimed its benefit, the district court had no way of knowing the number of situations in which employees lost credits by reason of a break in employment during a consecutive two-year period but did not seek the benefit of the exception. Certainly if there were such employees, they were treated the same as rather than differently from Foley.[9] But the district court did not consider this possibility.

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[9] The subcommittee's report said that "[g]enerally, the available for work-no work available exception has been applied liberally in almost all cases in which it has been invoked." The report, however, did not advise the Trustees of the number of cases in which the break-in-service forfeiture provision had been applied without the employee invoking the exception. Moreover, the parties' briefs do not suggest that there was any evidence on this point in the district court. In this regard, we point out that Foley had the burden of proof as he brought the action and had to demonstrate that the Trustees acted arbitrarily and capriciously. While we cannot be certain of the number of employees who did not receive the benefit of the break-in-service exception following an interruption of employment and forfeiture of credits, it may have been substantial. The list attached to the subcommittee's report reveals that over a period of about 15 years from 1980 until the subcommittee made its report, only 21 employees sought the benefit of the exception. Yet, according to the district court, the Fund had more than $130,000,000 "in its coffers" when Foley applied for fees. *See Foley v. IBEW Local Union 98 Pension Fund*, 2000 WL 1801273, at *4. A reasonable inference can be drawn from the size of the Fund that it must have provided for benefits for many employees and thus it well may be that many have lost pension credits by reason of breaks in service. Yet inasmuch as we only can speculate on this fundamental point, we do not understand how we can uphold the decision of the district court that the Trustees acted arbitrarily and capriciously. We add, however, that even without considering the possibility that some

(Continued on following page)

In summary, we conclude that in appointing a subcommittee to investigate the claims against Foley, the Trustees acted quite responsibly and consistently with their obligations as fiduciaries. Moreover, inasmuch as the Trustees' decision to deny the disputed benefits was not contrary to the Plan's terms and was rationally related to a legitimate Plan purpose, the district court erred in determining that the Trustees acted in an arbitrary and capricious manner. Furthermore, because Foley was not similarly situated to the other employees who were granted the benefit of the exception, the Trustees were not bound to grant him the benefit of the exception merely because they had applied it in other cases. Accordingly, we will reverse the judgment of the district court.[10]

IV. ATTORNEYS' FEES

Finally, we come to the question of the attorneys' fees which ERISA permits when a participant, beneficiary or fiduciary succeeds on any significant issue in the litigation which achieves some of the benefit sought from the suit. *See* 29 U.S.C. § 1132(g)(1). In light of our conclusions, it is clear that Foley has not prevailed on a significant issue in

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employees did not obtain the benefit of the break-in-service exception, our result would be the same as that we reach.

[10] The appellants contend that the district court erred in entering judgment against Scott Ernsberger, whom they describe as the Fund's "third party contract administrator," by reason of circumstances particular to him, and that the court also erred in calculating damages. In view of our result, we do not reach these issues as we are reversing the judgment as to all appellants, including Ernsberger on common grounds and directing judgment to be entered in their favor, and because there will not be any damages to calculate.

the litigation and thus, we will therefore reverse the district court's award of attorney fees. *See Hensley v. Northwest Permanente P.C. Ret. Plan & Trust*, 258 F.3d 986, 1002-03 (9th Cir. 2001).[11]

V. CONCLUSION

For the foregoing reasons, we will reverse the district court's judgment of August 29, 2000, and its order of December 8, 2000, and will remand the matter to the district court to enter judgment for the defendants.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

[11] Certain of the defendants unsuccessfully sought attorneys' fees in the district court but inasmuch as they are not at this time seeking these fees we do not review the district court's order denying their application.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 00-2767 and 00-4427

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NEILSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM C. RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LARRY J. BRADLEY, in his capacity as a TRUSTEE, FRED J. COMPTOM

International Brotherhood of Electrical Workers Local Union 98 Pension Fund, Scott Ernsberger, John J. Dougherty in his capacity as a Trustee, Edward Nielson, in his capacity as a Trustee, Joseph Agresti, in his capacity as a Trustee, Thomas J. Reilly, Jr., in his capacity as a Trustee, Dennis Link, in his capacity as a Trustee, William C. Rhodes in his capacity as a Trustee, Roy Dantz in his capacity as a Former Trustee, and Larry Bradley, in his capacity as a Former Trustee (Collectively the "Defendants"),

Appellants in No. 00-2767

EDWARD J. FOLEY, SR.

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 PENSION FUND; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL UNION 98 OF AMERICA; SCOTT ERNSBERGER; JOHN J. DOUGHERTY, in his capacity as a TRUSTEE and as an officer and BUSINESS MANAGER OF LOCAL 98; EDWARD NEILSON, in his capacity as a TRUSTEE and as an officer of LOCAL 98; JOSEPH AGRESTI, in his capacity as a TRUSTEE; THOMAS J. REILLY, JR., in his capacity as a TRUSTEE; DENNIS LINK, in his capacity as a TRUSTEE; WILLIAM C. RHODES, in his capacity as a TRUSTEE; ROY DANTZ, in his capacity as a TRUSTEE; LAWRENCE J. BRADLEY, in his capacity as a TRUSTEE,

Appellants in No. 00-4427

and FRED COMPTON

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 98-906)

Argued October 9, 2001

BEFORE: SCIRICA, GREENBERG, and COWEN, *Circuit Judges*

ORDER AMENDING OPINION

It is hereby ordered that the slip opinion in the above case filed November 8, 2001, be amended to the end that

the last word in the third paragraph in footnote 6 shall be "records" rather than "record" as shown on the bottom of page 10 of the slip opinion.

By the Court,

/s/ Morton I. Greenberg
Circuit Judge

DATED: NOV. 28 2001

ch/cc: LEB
LBH
RBS
EJF
DPM